

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
and the STATE OF NEW MEXICO,

Plaintiffs,

v.

THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY
COMPANY,

Defendant.

CIVIL ACTION NO. _____

CONSENT DECREE

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606 and 9607, against the defendant, The Burlington Northern and Santa Fe Railway Company (“BNSF” or “Settling Defendant”).

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by the EPA and the United States Department of Justice for response actions at the AT&SF Albuquerque Superfund Site in Albuquerque, New Mexico (“the Site”), together with accrued interest; and (2) performance of studies and response work by the Settling Defendant at the Site consistent with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 (as amended) (“NCP”).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA formally notified the State of New Mexico (the “State”) on March 31, 2003, of negotiations with the potentially responsible party regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. The State of New Mexico, on behalf of the Secretary of the New Mexico Environment Department (“NMED”), has also filed a complaint against the defendant in this Court under Section 107 of CERCLA, 42 U.S.C. § 9607, the New Mexico Hazardous Waste Act (“HWA”), NMSA 1978, § 74-4-13, and the New Mexico Water Quality Act (“WQA”), NMSA 1978 §§ 74-6-10(A) and 74-6-11(A).

E. The State of New Mexico in its complaint seeks: (1) reimbursement of costs to be incurred by the State for response actions at the Site; (2) injunctive relief to abate an imminent and substantial endangerment to health or the environment resulting from the disposal of any solid waste or hazardous waste at the Site; (3) injunctive relief to abate an imminent and substantial danger to public health resulting from a pollution source or combination of sources at the Site; and (4) injunctive relief to require compliance with a water quality standard adopted under the WQA.

F. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of the Interior (“DOI”), the Federal natural resource trustee, on or about March 31, 2003, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee to participate in the negotiation of this Consent Decree.

G. The Settling Defendant, having entered into this Consent Decree, does not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the complaints, nor does it acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

H. The Settling Defendant asserts that the United States Department of the Treasury, successor in interest to the United States Railroad Administration (“Settling Federal Agency”), is liable for a portion of the costs of response action at the Site due to the United States Railroad Administration’s alleged ownership or operation of the Site during World War I. The United

States, on behalf of the Settling Federal Agency, enters into this Consent Decree to resolve the claims of the Settling Defendant, without admitting any liability.

I. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List (NPL), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register. 59 Fed. Reg. 65212, 65221 (Dec. 16, 1994).

J. The Site was used for pressure treatment of various wood products (railroad ties, bridge timbers, fence posts, etc.), primarily with mixtures of creosote and oil from 1908 to 1972. The wood treating operations on this Site were dismantled in 1972.

K. BNSF, and its predecessor The Atchison, Topeka and Santa Fe Railway Company ("AT&SF"), have undertaken prior investigative and cleanup activities at the Site. AT&SF conducted preliminary Site investigations in 1986, and removed creosote-tainted debris from the wastewater reservoir located on the Site ("WWR") in 1990. In 1999, BNSF removed sludge and process residue from the WWR, and installed recovery trenches to collect dense non-aqueous phase liquids ("DNAPL"). In 2000, BNSF installed five recovery pumps to extract DNAPL under the RI/FS investigation of aquifer contamination. These recovery wells have been pumping DNAPL from the aquifer since 2000. Despite the prior investigative and cleanup activities, Site contaminants of concern remain in the soil above remediation goals. As of June 27, 2002, EPA estimated that these contaminants of concern included an estimated 59,300 to 75,000 gallons of DNAPL remaining in the subsurface, as well as approximately 5,600 cubic yards of contaminated surface soil and debris and 76,000,000 gallons of free phase contaminated ground water.

L. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, the Settling Defendant commenced on or about June 6, 1994, a Remedial

Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430, and Administrative Order on Consent, CERCLA Docket No. 6-12-94 ("AOC").

M. Pursuant to the AOC, the Settling Defendant completed a Remedial Investigation ("RI") Report in July 2001, a Soils Feasibility Study ("FS") Report in July 2001, and a Ground Water FS Report in July 2001.

N. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the availability of the Feasibility Study (which consisted of separate reports for soils and ground water) and of the proposed plan for remedial action on or about February 7, 2002, in a fact sheet and major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the EPA Region 6 Superfund Division Director based the selection of the response action.

O. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on June 27, 2002, on which the State has given its concurrence. The ROD includes EPA's explanation for any significant differences between the final plan and the proposed plan, as well as a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

P. Based on the information presently available to EPA and the State, EPA and the State believe that the Work will be properly and promptly conducted by the Settling Defendant, if conducted in accordance with the requirements of this Consent Decree and its appendices and work plans approved by EPA.

Q. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendant shall constitute a response action taken or ordered by the President.

R. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1367, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and the State and upon the Settling Defendant and its successors and assigns. Any change in ownership or corporate status of the Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing the Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

“Consent Decree” shall mean this Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Decree and any appendix, this Decree shall control.

“Day” shall mean a calendar day unless expressly stated to be a working day. “Working day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

“DOJ” shall mean the United States Department of Justice and any successor departments or agencies of the United States.

“Effective Date” shall be the effective date of this Consent Decree as provided in Paragraph 112.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States or the State incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 88 of Section XXI. Future Response Costs shall also include all Interim Response Costs, and all Interest on those Past Response Costs Settling Defendant has agreed to reimburse under this Consent Decree that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from September 1, 2003, to the date of entry of this Consent Decree.

“HWA” shall mean the New Mexico Hazardous Waste Act, as amended, NMSA 1978, §§ 74-4-1 to 74-4-14.

“Interim Response Costs” shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Site between September 1, 2003, and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

“Interest,” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each federal fiscal year.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“NMED” shall mean the New Mexico Environment Department and any predecessor or successor departments or agencies of the State of New Mexico.

“Operation and Maintenance” or “O & M” shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (“SOW”).

“Paragraph” shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

“Parties” shall mean the United States, the State of New Mexico, and the Settling Defendant.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through August 31, 2003, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date. However, such costs shall not include any pre-judgment interest which has accrued on any response costs which were incurred by the EPA prior to April 1, 2002, but which were never billed to the Settling Defendant.

“Performance Standards” shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in Sections 8.6, 9, and 12 of the ROD and Section C.2 of the SOW and any modified standards established by EPA pursuant to the “technical impracticability” provision of Paragraph 13.

“Plaintiffs” shall mean the United States and the State of New Mexico.

“RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the Site signed on or about June 27, 2002, by the EPA Region 6 Superfund Division Director, and all attachments thereto. The ROD is attached as Appendix A.

“Remedial Action” shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendant to implement the ROD, in accordance with the SOW and the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA.

“Remedial Action Work Plan” shall mean the document developed pursuant to Paragraph 12 of this Consent Decree and approved by EPA, and any amendments thereto.

“Remedial Design” shall mean those activities to be undertaken by the Settling Defendant to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

“Remedial Design Work Plan” shall mean the document developed pursuant to Paragraph 11 of this Consent Decree and approved by EPA, and any amendments thereto.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendant” or “BNSF” shall mean The Burlington Northern and Santa Fe Railway Company, and for purposes of Sections XXI, XXII, XXIII, and XXXIII of this Consent Decree shall include: (1) directors and officers of BNSF, to the extent that their alleged liability arises from actions taken in their official capacities as directors and officers of BNSF; (2) The Atchison, Topeka and Santa Fe Railway Company; and (3) successors to BNSF, to the extent that their alleged liability arises from their status as successors to BNSF.

“Settling Federal Agency” shall mean the United States Department of the Treasury, successor in interest to the United States Railroad Administration.

“Site” shall mean the AT&SF Albuquerque Superfund Site, encompassing approximately 42 acres, located at 3300 Second Street, S.W., Albuquerque, Bernalillo County, New Mexico, and depicted generally on the Site Location Map attached as Appendix C.

“State” shall mean the State of New Mexico.

“Statement of Work” or “SOW” shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance at the Site, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

“Supervising Contractor” shall mean the principal contractor retained by the Settling Defendant to supervise and direct the implementation of the Work under this Consent Decree.

“United States” shall mean the United States of America, including all of its departments, agencies and instrumentalities, which includes without limitation EPA, the Settling Federal Agency and any federal natural resources trustee.

“WQA” shall mean the New Mexico Water Quality Act, NMSA 1978, §§74-6-1 to 74-6-17.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any “pollutant or contaminant” under Section 101(33), 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous waste” or “solid waste” under the HWA, NMSA 1978 § 74-4-3(I) or (M); and any “water pollution” under the WQA, NMSA 1978, § 74-6-2(B).

“Work” shall mean all activities Settling Defendant is required to perform under this Consent Decree, except those required by Section XXV (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendant, to reimburse response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendant and the claims of Settling Defendant against Settling Federal Agency as provided in this Consent Decree.

6. Commitments by Settling Defendant and Settling Federal Agency. Settling Defendant shall finance and perform the Work in accordance with this Consent Decree, the

ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendant and approved by EPA pursuant to this Consent Decree. Settling Defendant shall also reimburse the United States and the State for Past Response Costs and Future Response Costs as provided in this Consent Decree. The Settling Federal Agency shall make a lump sum payment to the Settling Defendant in settlement of the Settling Defendant's claim for contribution against the Settling Federal Agency as provided in this Consent Decree.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD, the SOW, and all EPA approved work plans. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title.

a. With respect to any real property owned or controlled by the Settling Defendant that is located within the Site, within 30 days after the entry of this Consent Decree, the Settling Defendant shall submit to EPA for review and approval a notice to be filed with the Recorder's Office or Registry of Deeds or other appropriate office, Bernalillo County, State of New Mexico, which shall provide notice to all successors-in-title that the real property is part of the Site, that EPA selected a remedy for the Site on June 27, 2002, and that Settling Defendant has entered into a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. The Settling Defendant shall record the notice(s) within 10 days of EPA's approval of the notice(s). The Settling Defendant shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).

b. At least 30 days prior to the conveyance of any interest in real property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Settling Defendant conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access

easements”) pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as “restrictive easements”) pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, the Settling Defendant conveying the interest shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

c. In the event of any such conveyance, the Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of the Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the EPA approves, the grantee may perform some or all of the Work under this Consent Decree.

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work by Settling Defendant), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA after a reasonable opportunity for

review and comment by the State. Within 10 days after the lodging of this Consent Decree, Settling Defendant shall notify EPA and the State in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Settling Defendant shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed. EPA is familiar with the qualifications of TRC Environmental Corporation ("TRC") and believes TRC is fully qualified to be a Supervising Contractor. Based upon information known to EPA at this time, should the Settling Defendant propose TRC as its Supervising Contractor for purposes of this Consent Decree, EPA intends to issue an authorization to proceed. If at any time thereafter, Settling Defendant proposes to change a Supervising Contractor, Settling Defendant shall give such notice to EPA and the State and must obtain an authorization to proceed from EPA, after a reasonable opportunity for review and comment by the State, before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendant in writing. Settling Defendant shall submit to EPA and the State a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will

provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendant may select any contractor from that list that is not disapproved and shall notify EPA and the State of the name of the contractor selected within 21 days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendant from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

11. Remedial Design.

a. Within 30 days after EPA's issuance of an authorization to proceed pursuant to Paragraph 10, Settling Defendant shall submit to EPA and the State a work plan for the design of the Remedial Action at the Site ("Remedial Design Work Plan" or "RD Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the ROD, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the ROD, this Consent Decree and/or the SOW. Upon its approval by EPA, the Remedial Design Work Plan shall be incorporated into and become enforceable under this Consent Decree. Within 30 days after EPA's issuance of an authorization to proceed, the Settling Defendant shall submit to EPA and the State a Health and Safety Plan for field design activities which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Design Work Plan shall include plans and schedules for implementation of all Remedial Design and pre-design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of: (1) a Site Management Plan; (2) a

Health and Safety Plan; (3) a Sampling and Analysis Plan (including but not limited to, a Quality Assurance Project Plan [QAPP] in accordance with Section VIII); (4) a Contingency Plan; (5) the treatability study; (6) the Prefinal Remedial Design; and (7) the Final Remedial Design. In addition, the Remedial Design Work Plan shall include a schedule for completion of the Remedial Action Work Plan.

c. Upon approval of the Remedial Design Work Plan by EPA, after a reasonable opportunity for review and comment by the State, and submittal of the Health and Safety Plan for all field activities to EPA and the State, Settling Defendant shall implement the Remedial Design Work Plan. The Settling Defendant shall submit to EPA and the State all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendant shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

d. The preliminary design submittal shall include, at a minimum, the following: (1) design criteria; (2) results of treatability studies; (3) results of additional field sampling and pre-design work; (4) project delivery strategy; (5) preliminary plans, drawings and sketches; (6) required specifications in outline form; and (7) preliminary construction schedule.

e. The intermediate design submittal, if required by EPA or if independently submitted by the Settling Defendant, shall be a continuation and expansion of the preliminary design. Any value engineering proposals must be identified and evaluated during this review.

f. The pre-final/final design submittal shall include the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality

Assurance Project Plan (“CQAPP”); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); (5) Contingency Plan; (6) Air Monitoring Plan; and (7) Surface Water and Ground Water Monitoring Plan. The CQAPP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official (“QA Official”), independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project.

12. Remedial Action.

a. Within 60 days after the approval of the final design submittal, Settling Defendant shall submit to EPA and the State a work plan for the performance of the Remedial Action at the Site (“Remedial Action Work Plan”). The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the ROD and achievement of the Performance Standards, in accordance with this Consent Decree, the ROD, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree. At the same time as they submit the Remedial Action Work Plan, Settling Defendant shall submit to EPA and the State a Remedial Action Health and Safety Plan for field activities required by the Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall include the following:

- (1) schedule for completion of the Remedial Action;
- (2) method for selection of the contractor;
- (3) schedule for developing and submitting other required subordinate plans in accordance with the SOW;
- (4) groundwater monitoring plan;
- (5) methods for satisfying permitting requirements;

(6) methodology for implementation of the Operation and Maintenance Plan; (7) methodology for implementation of the Contingency Plan; (8) tentative formulation of the Remedial Action team; (9) construction quality control plan (by constructor); and (10) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The Remedial Action Work Plan also shall include the methodology for implementation of the Construction Quality Assurance Plan and a schedule for implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Settling Defendant's Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

c. Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Settling Defendant shall implement the activities required under the Remedial Action Work Plan. The Settling Defendant shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendant shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

13. Achievement of Performance Standards and Technical Impracticability

a. The Settling Defendant shall continue to implement the Remedial Action and O&M until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Consent Decree. The Settling Defendant may petition EPA to waive compliance with one or more of the Performance Standards for ground water contaminants resulting from non-recoverable free-phase or residual quantities of DNAPL present in the

subsurface, based on a demonstration that it is technically impracticable, from an engineering perspective, to attain those standards. The determination of whether attainment of a particular Performance Standard is technically impracticable will be made by EPA and will be based on the engineering feasibility and reliability of the remedy.

b. EPA will consider a petition for a waiver of Performance Standards on technical impracticability grounds only after the selected ground water remedy has been operational and functional for a sufficient time period such that the second Site Five Year Review pursuant to section 121(c) of CERCLA, 42 U.S.C. §9621(c), shall have been completed and sufficient valid analytical data shall have been accumulated to make reliable predictions concerning the selected remedy's ability to achieve the Performance Standards. This determination will be made by EPA based on Site-specific data and conditions. If the first petition is rejected, a subsequent petition will be considered by EPA only if EPA determines that it is based on significant new Site-specific data which could not have been developed at the time the previous petition was submitted. Neither the submission of a petition by Settling Defendant nor the granting of a waiver of one or more Performance Standards by EPA pursuant to this Paragraph shall relieve Settling Defendant of its obligation to (i) continue to operate the ground water remedy until the time specified by EPA, (ii) attain Performance Standards for which EPA has not specifically granted a waiver, and (iii) complete any other obligation under this Consent Decree.

c. Such a petition shall include, at a minimum, the information and analyses required by EPA guidance and the Site-specific information described in Subparagraphs 13.c(1) through 13.c(12), as follows:

(1) A list of each Performance Standard for which a waiver is sought, and the spatial limits for which they are sought. The justification for a waiver required by items (2) - (12) immediately below must be made for each contaminant or class of contaminants for which a waiver is sought.

(2) A description of known or suspected ground water contaminant sources at the Site, including DNAPL contaminants. The petition shall also describe source control and removal efforts that have been implemented and the effectiveness of those efforts.

(3) Comprehensive ground water monitoring data and an evaluation of the ground water remedy implemented, along with any other remediation actions performed which enhanced or affected this remedy. The monitoring data and performance evaluation shall demonstrate, using an appropriate engineering and statistical analysis, that the ground water remedy has been operating for a sufficient period of time, as determined by EPA, to permit a reliable analysis of its performance and its ability to achieve Performance Standards. The petition shall also demonstrate that the remedy has been designed, constructed, and operated in a manner which is consistent with the RD/RA Workplan and the conceptual models for Site contamination, and that the system has been modified or enhanced to the extent practicable to optimize its performance in an effort to attain the Performance Standards.

(4) A description of the conceptual model for Site contamination, including geologic, hydrogeologic, and geochemical characterizations. A description of the distribution, characteristics, migration, potential migration and fate, and quantities of contaminants present at the Site. These descriptions shall incorporate pertinent data obtained during the design, construction, and operation of the remedial system, as well as information obtained during previous Site characterization efforts.

(5) An analysis of the performance of the ground water remedy which describes the spatial and temporal trends in ground water contaminant concentrations within the ground water plume; for example, whether contaminant migration has been effectively prevented, as well as any reductions or changes in the overall size or location of the ground water plume, or stabilized or very slow decreases in contaminant concentrations. The petition shall discuss the hydrogeochemical factors which influence the remedy's ability to achieve the Performance Standards, and demonstrate how these factors inhibit the remedial system from achieving the Performance Standards.

(6) The mass of contaminants removed from the ground water by the remedial system, and an estimate of the mass of contaminants remaining, including the degree of uncertainty involved in this estimate.

(7) A demonstration, including appropriate engineering analysis, that other conventional or innovative technologies which are potentially applicable at the Site cannot attain the Performance Standards in a manner that is practicable from an engineering perspective, which may include a demonstration that the cost of such attainment would be inordinately high. See 55 Fed. Reg. 8666, 8748 (March 8, 1990), and Guidance for Evaluating the Technical Impracticability of Ground-Water Restoration, U.S. EPA, Office of Solid Waste and Emergency Response Directive 9234.2-25, September 1993. This demonstration should include a prediction of the level of cleanup other technologies can attain.

(8) A predictive analysis of the approximate time frame required to achieve the Performance Standards with the existing ground water remedy, and any alternative remedial strategies, if applicable, using methods appropriate for the data and the Site-specific conditions. Such analyses should also address the uncertainty inherent in these predictions.

(9) For the implemented remedy and for any alternative remedial strategies proposed as part of this petition, identification of the potential pathways by which humans and the environment are or may become exposed to the contaminated ground water left in place. Contaminant concentration and other data needed for EPA to perform risk analyses shall be provided as part of the petition.

(10) A description of the proposed alternative remedial strategy, or a comparison of two or more strategy options, proposed to be implemented by the Settling Defendant if a waiver is granted, and the level of cleanup and control of hazardous substances, pollutants, and contaminants the proposed alternative strategy or strategies will attain. Alternative remedial strategies must attain a level of cleanup and control of further releases which ensures protection of human health and the environment, and prevents further migration of contaminated ground water. Alternative remedial strategies may include the establishment of alternative Performance Standards, Site-specific cleanup levels, and other alternative remediation requirements to ensure protectiveness. Proposed modifications to the existing remedy, and any additional response actions proposed to be undertaken, shall be described by the Settling Defendant in detail. EPA will make the final determination regarding the components of the alternative remedial strategy which shall be implemented at the Site by the Settling Defendant.

(11) A description of any additional ground water monitoring required to verify compliance with the alternative Performance Standards or remedial requirements. EPA will make the final determination regarding the scope of the ground water monitoring requirements under the alternative remedial strategy.

(12) Other information or analyses not included above, but which the Settling Defendant or the EPA considers appropriate to making a determination on the petition.

d. Upon receipt of all information required by this Paragraph, EPA will review and consider the information in the petition and any other relevant information. After opportunity for review and comment by the State, EPA will determine (1) whether compliance with any of the Performance Standards shall be waived; (2) what, if any, alternative remediation requirements, including alternative Performance Standards and other protective measures, will be established by EPA; (3) whether modifications to the ground water portion of the Remedial Action or any additional response actions relating to ground water contamination are required; and (4) whether revised interim milestone and completion dates are needed for attainment of Performance Standards or alternative Performance Standards under this Consent Decree. EPA's determination on the petition will be consistent with the National Contingency Plan, Section 121(d) of CERCLA, and any other applicable laws, regulations, and guidance in effect at the time. Within ten days of the date that it renders the determination required by this Paragraph, EPA will forward a copy to Settling Defendant of any information or analysis not submitted by or available to Settling Defendant, which EPA relied upon in its determinations; and EPA will ensure that a copy of any such information or analysis is made a part of the administrative record required by Paragraph 68 of this Consent Decree.

e. If EPA, after a reasonable opportunity for review and comment by the State, grants any petition or other relief pursuant to this Paragraph, that decision will be reflected in a post-ROD decision document, as required by the NCP. If modification of this Consent Decree or the Statement of Work attached as Appendix B to this Consent Decree is required to implement EPA's decision, such modification will be filed and, if necessary, Court approval will be sought in accordance with Section XXXI of this Consent Decree (Modification).

f. Upon issuance of EPA's post-ROD decision document, filing of the revised Statement of Work and Consent Decree with the Court and, if necessary, issuance of a court order approving the modification, the Settling Defendant shall implement the modifications selected by EPA to the ground water portion of the Remedial Action or additional response actions relating to ground water contamination, and achieve and maintain all Performance Standards, alternative Performance Standards, and remediation requirements established pursuant to this Paragraph. Unless expressly modified by EPA's decision on the petition submitted hereunder, all requirements of this Consent Decree, including the Settling Defendant's obligation to achieve the alternative Performance Standards and to conduct long-term ground water monitoring, shall continue in force and effect.

g. The EPA's decisions regarding, and findings with respect to, any petition submitted under this Paragraph 13 shall be deemed a determination regarding the adequacy and selection of a response action within the meaning of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), and shall be subject to dispute resolution under Paragraph 68 of this Consent Decree, if informal resolution fails.

14. Modification of the SOW or Related Work Plans.

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, EPA may issue written notification to the Settling Defendant requiring that such modification be incorporated in the SOW and/or such work plans, provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the ROD.

b. For the purposes of this Paragraph and Paragraphs 50 and 51 only, the “scope of the remedy selected in the ROD” is: all of the standards, requirements, plans, actions, activities, investigations, and the like, including design, construction, monitoring, Operation and Maintenance, and Performance Standards mandated by the Record of Decision for remedial action for both ground water and soils in connection with the AT&SF Albuquerque Superfund Site, as determined and selected by the EPA Region 6 Superfund Division Director on or about June 27, 2002, pursuant to the re-delegated authority of the EPA Region 6 Regional Administrator.

c. If Settling Defendant objects to any modification determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XIX (Dispute Resolution). If informal negotiation is not successful, then Paragraph 68 (record review) applies. The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendant shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

f. Settling Defendant may seek modification of the Work Plans pursuant to Paragraph 117.

15. Settling Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or

representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

16. a. Settling Defendant shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

(1) The Settling Defendant shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendant shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(2) The identity of the receiving facility and state will be determined by the Settling Defendant following the award of the contract for Remedial Action construction. The Settling Defendant shall provide the information required by Paragraph 16.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Settling Defendant shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. §300.440. Settling Defendant shall only send hazardous substances,

pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

c. In the event that the Settling Defendant proposes to transport Waste Material from the Site to the nation of Canada for proper treatment or disposal, then Subparagraphs “16.a” and “16.b” above shall not be applicable. In such event, the Settling Defendant shall comply with applicable United States-Canada treaty provisions and applicable international conventions or treaties, as well as applicable United States and Canadian laws and regulations. Such United States laws and regulations shall include without limitation, compliance with RCRA regulations (involving approved State programs where applicable), including the Hazardous Waste Export regulations at 40 C.F.R. Part 262, Subpart E, and Transporter regulations at 40 C.F.R. Part 263. Such compliance shall also include any applicable Canadian provincial laws and regulations. In connection with any notification or certification involving transport of waste to Canada that may be mandated by the provisions required in this sub-paragraph, the Settling Defendant shall simultaneously provide a copy of the same to the EPA as provided in the notice provisions of Paragraph 111 of this Consent Decree, in addition to any addressees or recipients otherwise required.

VII. REMEDY REVIEW

17. Periodic Review. Settling Defendant shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

18. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select

further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

19. Opportunity To Comment. Settling Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

20. Settling Defendant's Obligation To Perform Further Response Actions. If EPA selects further response actions for the Site, the Settling Defendant shall undertake such further response actions to the extent that the reopener conditions in Paragraph 84 or Paragraph 85 (United States' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 84 or Paragraph 85 of Section XXI (Covenants by Plaintiffs) are satisfied, (2) EPA's determination that the Remedial Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 68 (record review).

21. Submissions of Plans. If Settling Defendant is required to perform the further response actions pursuant to Paragraph 20, Settling Defendant shall submit a plan for such Work to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendant) and Settling Defendant shall implement the plan approved by EPA in accordance with the provisions of this Consent Decree.

VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

22. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001) "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendant of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendant shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendant shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendant in implementing this Consent Decree. In addition, Settling Defendant shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendant shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree;

however, upon approval by EPA, after opportunity for review and comment by the State, the Settling Defendant may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Settling Defendant shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendant shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Settling Defendant shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

23. Upon request, the Settling Defendant shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Settling Defendant shall notify EPA and the State not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary. Upon request, EPA and the State shall allow the Settling Defendant to take split or duplicate samples of any samples they take as part of the Plaintiffs' oversight of the Settling Defendant's implementation of the Work.

24. Settling Defendant shall submit to EPA and the State two (2) copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling

Defendant with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

25. Notwithstanding any provision of this Consent Decree, the United States and the State hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, the HWA, the WQA, and any other applicable statutes or regulations.

IX. ACCESS AND INSTITUTIONAL CONTROLS

26. If the Site, or any other property where access and/or land or water use restrictions are needed to implement this Consent Decree, is owned or controlled by the Settling Defendant, the Settling Defendant shall meet the following requirements:

a. Commencing on the date of lodging of this Consent Decree, the Settling Defendant shall provide the United States, the State, and their representatives, including EPA and its contractors and NMED and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities consistent with this Consent Decree:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States or the State;
- (3) Conducting investigations relating to contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;

(6) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;

(7) Implementing the Work pursuant to the conditions set forth in Paragraph 88 of this Consent Decree;

(8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XXIV (Access to Information);

(9) Assessing Settling Defendant's compliance with this Consent Decree; and

(10) Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree.

Parties granted access pursuant to this Paragraph 26 shall comply with all applicable laws and the Site Health and Safety Plan in effect at the time access is granted;

b. Commencing on the date of lodging of this Consent Decree, the Settling Defendant shall refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Such restrictions include, but are not limited to, the following: any residential use or development; any industrial or commercial use or development that would threaten or damage any remedial component such as fencing, cap, covers, berms, monitor or extraction wells or pumps, waste storage or treatment vessels or devices, or the like; any use or development that would result in unacceptable human exposure to Site contamination; or any use or development of Site ground water. EPA understands that the

Settling Defendant has tentative plans for a part of the Site to be developed for railroad use. EPA has no objection to Settling Defendant's use of the Site for such purposes, provided that EPA determines in writing prior to the commencement of any such redevelopment that such use will not interfere with or adversely affect the implementation, integrity or protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Further, redevelopment of any portion of the Site may only commence in compliance with the SOW and only after EPA has provided written approval verifying in writing that the Remediation Goals have been met for the medium or media that will potentially be affected by the proposed redevelopment. Subject to the standards set forth in this sub-paragraph and after the Settling Defendant has provided EPA not less than 30 days advance written notice and received written approval of the EPA, then the Settling Defendant may remove improvements, including, without limitation, monitor wells and related facilities; provided that the Settling Defendant replaces such improvements with improvements of equal quality and effectiveness; and

c. If EPA or NMED so request, the Settling Defendant shall execute and record in the Recorder's Office or Registry of Deeds or other appropriate land records office of Bernalillo County, State of New Mexico, an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.a of this Consent Decree, and (ii) grants the right to enforce the land or water use restrictions listed in Paragraph 26.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. In the event of such a request, the Settling Defendant shall grant the access rights and the rights to enforce the land/water use restrictions to (i) the United

States, on behalf of EPA, and its representatives, (ii) the State and its representatives, and (iii) other appropriate grantees. The Settling Defendant shall, within 45 days of receipt of the EPA request, submit to EPA for review and approval with respect to such property:

(1) A draft easement, in substantially the form attached hereto as Appendix D, that is enforceable under the laws of the State of New Mexico, and

(2) A current title insurance commitment or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendant is unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement and the title evidence, the Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, record the easement with the Recorder's Office or Registry of Deeds or other appropriate office of Bernalillo County.

Within 30 days of recording the easement, the Settling Defendant shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps. If the easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

27. If the Site, or any other property where access and/or land or water use restrictions are needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendant, Settling Defendant shall use best efforts to secure from such persons:

a. An agreement to provide access thereto for Settling Defendant, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.a of this Consent Decree;

b. An agreement, enforceable by the Settling Defendant and the United States, to refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree; and

c. If EPA or NMED so request, the execution and recordation in the Recorder's Office or Registry of Deeds or other appropriate land records office of Bernalillo County, State of New Mexico, of an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. The access rights and/or rights to enforce land or water use restrictions shall be granted to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, and (iii) other appropriate grantees. In the event of such a request from EPA, within 45 days of receipt of the request, Settling Defendant shall submit to EPA for review and approval with respect to such property:

(1) A draft easement, in substantially the form attached hereto as Appendix D, that is enforceable under the laws of the State of New Mexico, and

(2) A current title insurance commitment, or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendant is unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement and the title evidence, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, the easement shall be recorded with the Recorder's Office or Registry of Deeds or other appropriate office of Bernalillo County.

Within 30 days of the recording of the easement, Settling Defendant shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps. If easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

28. For purposes of Paragraphs 26 and 27 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land or water use restrictions, restrictive easements, and/or an agreement to release or subordinate a prior lien or encumbrance. If (a) any access or land or water use restriction agreements required by Paragraphs 27.a or 27.b of this Consent Decree are not obtained within 45 days of receipt of a request from EPA, (b) any access easements or restrictive easements required by Paragraph 27.c of this Consent Decree are not submitted to EPA in draft form within 45 days of receipt of a request from EPA or (c) Settling Defendant is unable to obtain an

agreement pursuant to Paragraph 26.c.(1) or Paragraph 27.c.(1) from the holder of a prior lien or encumbrance to release or subordinate such lien or encumbrance to the easement being created pursuant to this Consent Decree within 45 days of receipt of a request from EPA, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendant has taken to attempt to comply with Paragraph 26 or 27 of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendant in obtaining access or land or water use restrictions, either in the form of contractual agreements or in the form of easements running with the land, or in obtaining the release or subordination of a prior lien or encumbrance. *Settling Defendant shall reimburse the United States in accordance with the procedures in Section XVI (Payments for Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access, land or water use restrictions, and/or the release or subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.*

29. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with EPA's and the State's efforts to secure such governmental controls.

30. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, the HWA, the WQA, and any other applicable statute or regulations.

X. REPORTING REQUIREMENTS

31. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit to EPA and the State 2 copies of written monthly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendant or its contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Settling Defendant has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Settling Defendant shall submit these progress reports to EPA and the State by the tenth day of every month following the lodging of this Consent Decree until EPA notifies the Settling Defendant pursuant to Paragraph 51.b of Section XIV (Certification of Completion). If requested by EPA or the State, Settling Defendant shall also provide briefings for EPA and the State to discuss the progress of the Work.

32. The Settling Defendant shall notify EPA of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to,

data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

33. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendant shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Response and Prevention Branch, Region 6, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

34. Within 20 days of the onset of such an event, Settling Defendant shall furnish to Plaintiffs a written report, signed by the Settling Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendant shall submit a report setting forth all actions taken in response thereto.

35. Settling Defendant shall submit 2 copies of all plans, reports, and data required by the SOW, the Remedial Design Work Plan, the Remedial Action Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendant shall simultaneously submit 2 copies of all such plans, reports and data to the State. Upon request by EPA or NMED, Settling Defendant shall submit in electronic form all portions of any report or other deliverable Settling Defendant is required to submit pursuant to the provisions of this Consent Decree.

36. All reports and other documents submitted by Settling Defendant to EPA (other than the monthly progress reports referred to above) which purport to document Settling Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendant, which may be the Supervising Contractor.

XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

37. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendant modify the submission; or (e) any combination of the above. However, EPA shall not modify or disapprove such a submission, whether pursuant to Subparagraph (c) above individually or any combination of the actions set forth in Subparagraphs (a) thru (e) above, without first providing Settling Defendant at least one written notice of deficiency providing an explanation of the claimed deficiency and an opportunity to cure the deficiency and resubmit the plan, report, or other item for approval within 30 days after receipt of EPA's notice, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

38. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 37(a), (b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the

submission to cure the deficiencies pursuant to Paragraph 37(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

39. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 37(d), Settling Defendant shall, within 30 days after its receipt of such notice or such longer time as specified by EPA, or as mutually agreed upon, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the thirty (30) day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 40 and 41.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 37(d), Settling Defendant shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendant of any liability for stipulated penalties under Section XX (Stipulated Penalties).

40. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Settling Defendant shall implement any such plan, report, or item as modified or developed by EPA, subject only to its right to invoke the procedures set forth in Section XIX (Dispute Resolution).

41. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendant shall be deemed to have failed to submit such plan,

report, or item timely and adequately unless the Settling Defendant invokes the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX.

42. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XII. PROJECT COORDINATORS

43. Within 20 days of lodging this Consent Decree, Settling Defendant, the State, and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. However, as noted in Paragraph 10 of this Consent Decree, the EPA has already reviewed the qualifications of TRC and believes it to be fully qualified as a Supervising Contractor. Based upon current information, should the Settling Defendant propose TRC as its Supervising Contractor, then EPA intends to

issue an authorization to proceed. The Settling Defendant's Project Coordinator shall not be an attorney for the Settling Defendant in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

44. Plaintiffs may designate other representatives, including, but not limited to, EPA and State employees, and federal and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when she or he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

45. EPA's Project Coordinator and the Settling Defendant's Project Coordinator will meet, at a minimum, on a quarterly basis, unless otherwise agreed.

XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

46. Within 30 days of entry of this Consent Decree, Settling Defendant shall establish and maintain financial security in the amount of \$64,000,000.00 in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;

- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Settling Defendant;
- e. A demonstration that the Settling Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f).

Within 60 days of EPA approval of the final Site Remedial Design for both soil and ground water, the Settling Defendant shall submit to EPA for review and approval a comprehensive revised cost estimate for all remaining Work under this Consent Decree, including the total cost for soil and ground water remediation at the Site, based upon the EPA approved Site Remedial Design. This revised cost estimate shall be based upon detailed vendor or contractor quotes and shall comply with the guidance "A Guide to Developing and Documenting Cost Estimates During the Feasibility Study," EPA 540-R-00-002, OSWER 9355.0-O75. This revised cost estimate shall include, without limitation, all of the costs of remedial construction through the "operational and functional" determination, as well as an O&M period of not less than 30 years for soil cleanup; ground water restoration through pump and treat; and DNAPL source removal and hot spot treatment. Upon EPA approval of this revised cost estimate, or other determination of such revised cost estimate consistent with Section XI, the amount of financial security required by this Paragraph to be maintained by the Settling Defendant shall be immediately revised to comport with such revised cost estimate. Within 30 days after such EPA approval or determination, the Settling Defendant shall comply with such revised financial security amount in accordance with all of the applicable provisions of this Section. The EPA's decisions regarding, and findings with respect to, the revised cost estimate required by this Paragraph shall be deemed a determination regarding the adequacy and selection of a response action within the

meaning of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), and shall be subject to dispute resolution under Paragraph 68 of this Consent Decree, if informal resolution fails. In the event of a dispute, the Settling Defendant shall comply with the financial security amount in accordance with the final administrative or judicial decision resolving the dispute.

47. If the Settling Defendant seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 46.d of this Consent Decree, Settling Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendant seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 46.d or 46.e, it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA, after a reasonable opportunity for review and comment by the State, determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendant shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 46 of this Consent Decree. Settling Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

48. If Settling Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 46 above after entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Settling Defendant shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA.

In the event of a dispute, Settling Defendant may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

49. Settling Defendant may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

XIV. CERTIFICATION OF COMPLETION

50. Completion of the Remedial Action.

a. Within 90 days after Settling Defendant concludes that the Remedial Action has been fully performed and the Performance Standards have been attained, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, and the State. If, after the pre-certification inspection, the Settling Defendant still believes that the Remedial Action has been fully performed and the Performance Standards have been attained, it shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and the Settling Defendant's Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of the Settling Defendant or the Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false

information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards, provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendant. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants by Plaintiffs). Certification of Completion of the Remedial Action shall not affect Settling Defendant's remaining obligations under this Consent Decree.

51. Completion of the Work.

a. Within 90 days after Settling Defendant concludes that all phases of the Work (including O & M) have been fully performed, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, and the State. If, after the pre-certification inspection, the Settling Defendant still believes that the Work has been fully performed, Settling Defendant shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of the Settling Defendant or the Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Work, provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules

established therein, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendant and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendant in writing and will issue a Certificate of Completion of the Work.

XV. EMERGENCY RESPONSE

52. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall, subject to Paragraph 53, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendant shall notify the EPA Response and Prevention Branch, Region 6. Settling Defendant shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendant fails to take appropriate response action as required by this Section, and EPA or, as appropriate, the State take such action instead, Settling Defendant shall reimburse EPA and the State all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs).

53. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, or the State, a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants by Plaintiffs).

XVI. PAYMENTS FOR RESPONSE COSTS

54. Settling Defendant's Payments for Past Response Costs.

a. Within 30 days of the Effective Date, Settling Defendant shall pay to EPA \$324,980.74 (\$303,787.78 in EPA costs and \$21,192.96 in DOJ costs) in payment for Past Response Costs. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 2004v00273, EPA Site/Spill ID Number 06 1R, and DOJ Case Number 90-11-2-07889. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of New Mexico following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

b. At the time of payment, Settling Defendant shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVI (Notices and Submissions). Settling Defendant shall also send notice to the Chief, Cost Recovery Section, U.S. EPA Region 6 (6SF-AC), 1445 Ross Ave., Suite 1200, Dallas, TX 75202.

c. The total amount to be paid by Settling Defendant pursuant to Subparagraph 54.a shall be deposited in the AT&SF Albuquerque Superfund Site (SSID 06 1R) Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, to be transferred by EPA to the Hazardous Substance Superfund, or to be used in support of prior disbursements for cleanup activities at or in connection with this Site. To the extent that any of these funds are due to the State, EPA shall be responsible for disbursing them to the State.

55. Settling Defendant's Payments for Future Response Costs.

a. Settling Defendant shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis the United States will send Settling Defendant a bill requiring payment that includes an EPA Integrated Financial Management System ("IFMS") Itemized Cost Summary, and if applicable, a DOJ Itemized Cost Summary. Settling Defendant shall make all payments within 30 days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 56. Settling Defendant shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, EPA Site/Spill ID Number 06 1R, and DOJ Case Number 90-11-2-07889. Settling Defendant shall send the check(s) to:

U.S. Environmental Protection Agency, Superfund Accounting, Region 6, P.O. Box
360582M, Pittsburgh, PA 15251, Attn: Superfund Collection Officer

b. Settling Defendant shall clearly mark the check or other transaction record "Acct. #(AT&SF Albuquerque) 06 1R" and shall reference DOJ Case No. 90-11-2-07889 and U.S.A.O. File No. 2004v00273.

c. Settling Defendant shall submit notice of such payment including a copy of EFT transmittal documentation, money order, cashier's check, or certified check to the Chief, Cost Recovery Section (6SF-AC), Superfund Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Suite 1200, Dallas, TX 75202-2733, and to the Chief, Environmental Enforcement Section, U.S. Department of Justice, at the address specified in Paragraph 111.

d. The total amount to be paid by Settling Defendant pursuant to Subparagraph 55.a shall be deposited in the AT&SF Albuquerque Superfund Site (SSID 06 1R) Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, to be transferred by EPA to the Hazardous Substance Superfund, or to be used in support of prior disbursements for cleanup activities at or in connection with this Site. To the extent that any of these funds are due to the State, EPA shall be responsible for disbursing them to the State.

e. Settling Defendant shall reimburse the State for all State Future Response Costs not inconsistent with the National Contingency Plan. The State will send Settling Defendant a bill requiring payment that includes an itemized cost summary, which includes direct and indirect costs incurred by the State and its contractors, on a periodic basis. Settling Defendant shall make all payments within 30 days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 56. The Settling Defendant shall make all payments to the State required by this Paragraph in the form of a certified or cashier's check or checks made payable to the State of New Mexico, referencing the name and address of the party making the payment and the docket number of the case. A copy of the transmittal letter shall be sent to the undersigned counsel for NMED. Settling Defendant shall send the check(s) to:

New Mexico Environment Department
Ground Water Quality Bureau
P.O. Box 26110
Santa Fe, NM 87502-6110
Attn: James Rogers

56. Settling Defendant may contest payment of any Future Response Costs under Paragraph 55 if it determines that the United States or the State has made an accounting error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) or the State (if the State's accounting is being disputed) pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendant shall within the 30 day period pay all uncontested Future Response Costs to the United States or the State (if State costs are disputed) in the manner described in Paragraph 55. Simultaneously, the Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New Mexico and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendant shall send to the United States, as provided in Section XXVI (Notices and Submissions), and the State a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendant shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States or

the State prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendant shall pay the sums due (with accrued Interest) to the United States or the State (if State costs are disputed) in the manner described in Paragraph 55. If the Settling Defendant prevails concerning any aspect of the contested costs, the Settling Defendant shall pay that portion of the costs (plus associated accrued Interest) for which it did not prevail to the United States or the State (if State costs are disputed) in the manner described in Paragraph 55; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendant's obligation to reimburse the United States and the State for their Future Response Costs.

57. In the event that the payments required by Subparagraph 54.a are not made within 30 days of the Effective Date or the payments required by Paragraph 55 are not made within 30 days of the Settling Defendant's receipt of the bill, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendant's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraphs 72 and 73. The Settling Defendant shall make all payments required by those Paragraphs in the manner described in Paragraph 55.

57.1. Settling Federal Agency's Payment for Past and Future Response Costs.

a. As soon as reasonably practicable after the Effective Date of this Consent Decree, the United States, on behalf of the Settling Federal Agency, shall pay to the Settling Defendant \$590,000.00 in settlement of Settling Defendant's claim for contribution against the Settling Federal Agency. In the event this payment is not made within 30 days of the Effective Date, Interest on the unpaid balance shall be paid, commencing on the Effective Date and accruing through the date of payment.

b. Settling Federal Agency shall submit notice of such payment including a copy of EFT transmittal documentation, to the Chief, Cost Recovery Section (6SF-AC), Superfund Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Suite 1200, Dallas, TX 75202-2733, and to the Chief, Environmental Enforcement Section, U.S. Department of Justice, and the Chief, Environmental Defense Section, U.S. Department of Justice at the addresses specified in Paragraph 111.

c. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of the Settling Federal Agency under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

XVII. INDEMNIFICATION AND INSURANCE

58. Settling Defendant's Indemnification of the United States and the State.

a. The United States (except for its obligation to make payment on BNSF's contribution claim pursuant to Paragraph 57.1) and the State do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's

authorized representative under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States (with the exception of the Settling Federal Agency), the State, and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendant agrees to pay the United States (with the exception of the Settling Federal Agency) and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Neither the United States, nor the State, shall be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendant, nor any such contractor, shall be considered an agent of the United States or the State in carrying out activities pursuant to this Consent Decree.

b. The United States and the State shall give Settling Defendant notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph 58, and shall consult with Settling Defendant prior to settling such claim.

59. Settling Defendant waives all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United

States or the State, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

60. No later than 15 days before commencing any on-site Work, Settling Defendant shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Subparagraph 50.b of Section XIV (Certification of Completion)] comprehensive general liability insurance with limits of 10 million dollars, combined single limit, and motor vehicle liability insurance with limits of 5 million dollars, combined single limit, naming the United States and the State as additional insureds. In addition, for the duration of this Consent Decree, Settling Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendant shall provide to EPA and the State certificates of such insurance and a copy of each insurance policy. Settling Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendant demonstrates by evidence satisfactory to EPA and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling

Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XVIII. FORCE MAJEURE

61. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendant, of any entity controlled by Settling Defendant, or of Settling Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. The requirement that the Settling Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

62. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendant or its authorized representative shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 6, within 72 hours of when Settling Defendant first knew that the event might cause a delay. Within 5 working days thereafter, Settling Defendant shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendant's rationale for attributing such delay to a force majeure event if it

intends to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors knew or should have known.

63. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendant in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

64. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), it shall do so no later than 15 days after receipt of

EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 61 and 62, above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XIX. DISPUTE RESOLUTION

65. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section.

66. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the Parties to the dispute. The period for informal negotiations shall not exceed 40 days from the time the dispute arises, unless it is modified by written agreement of the Parties to the dispute. The dispute shall be considered to have arisen when one Party sends the other Parties a written Notice of Dispute.

67. Statements of Position.

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on

the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendant. The Statement of Position shall specify the Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 68 or Paragraph 69.

b. Within 10 days after receipt of Settling Defendant's Statement of Position, EPA will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 68 or 69. Within 7 days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 68 or 69, the Parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 68 and 69.

68. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree.

Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position and supporting documentation by the Parties to the dispute for inclusion in the administrative record of the dispute.

b. The Director of the Superfund Division, EPA Region 6, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 68.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 68.c and d.

c. Any administrative decision made by EPA pursuant to Paragraph 68.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendant with the Court and served on all Parties within 10 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendant's motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Superfund Division is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 68.a.

69. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendant's Statement of Position submitted pursuant to Paragraph 67, the Director of the Superfund Division, EPA Region 6, will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on the Settling Defendant unless, within 10 days of receipt of the decision, the Settling Defendant files with the Court and serves on the Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendant's motion.

b. Notwithstanding Paragraph I.Q of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

70. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendant under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 79. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

XX. STIPULATED PENALTIES

71. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 72 and 73 to the United States and the State (75 percent to the United States and 25 percent to the State of New Mexico) for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure) or otherwise agreed in writing between Settling Defendant and the United States. "Compliance" by Settling Defendant shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

72. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 72.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 5,750.00	1st through 14th day
\$ 9,000.00	15th through 30th day
\$12,000.00	31st day and beyond

b. Compliance Milestones.

(1) Compliance Milestones to which the stipulated penalties set forth above in this Paragraph shall apply are the timely accomplishment of the deliverables set forth as "major submittals" for Remedial Design and for Remedial Action listed and shown in the tables and footnotes styled Attachment 1 and Attachment 2 to the Statement of Work, Appendix B to this Consent Decree (except the specific deliverable items noted

in Paragraph 73 below), as well as the emergency reporting requirements of Paragraphs 33 and 34 of this Consent Decree. Payment of the applicable stipulated penalty shall be made in accordance with Paragraph 77 of this Consent Decree.

73. Stipulated Penalty Amounts - Reports.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate regular monthly reports, or other written documents pursuant to Paragraphs 31 and 32 of this Consent Decree and deliverable items number D4, E1.1, E1.3, and F1.2 of Attachments 1 and 2 to the Statement of Work, Appendix B to this Consent Decree. Payment of the applicable stipulated penalty shall be made in accordance with Paragraph 77 of this Consent Decree.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 2,000.00	1st through 14th day
\$ 4,000.00	15th through 30th day
\$ 8,000.00	31st day and beyond

74. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 88 of Section XXI (Covenants by Plaintiffs), Settling Defendant shall be liable for a stipulated penalty in the amount of \$750,000.00. Additionally, and notwithstanding any other provision of this Consent Decree, for each day that the Settling Defendant continues Work or activity after the EPA Project Coordinator orders cessation or halt of Work or activity pursuant to Section XII of this Consent Decree (Project Coordinators), the Settling Defendant shall pay a stipulated penalty of \$25,000.00 per day. The EPA Project Coordinator's order may be verbal or written; all verbal orders shall be confirmed in writing by the EPA Project Coordinator within 48 hours after issuance.

75. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendant of any deficiency; (2) with respect to a decision by the Director of the Superfund Division , EPA Region 6, under Paragraph 68.b or 69.a of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

76. Following EPA's determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendant written notification of the same and describe the noncompliance. EPA and the State may send the Settling Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendant of a violation.

77. All penalties accruing under this Section shall be due and payable to the United States and the State within 30 days of the Settling Defendant's receipt from EPA of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures

under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Superfund Accounting, Region 6, P.O. Box 360582M, Pittsburgh, PA 15251, Attn: Superfund Collection Officer , shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 06 1R, the DOJ Case Number 90-11-2-07889, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and Submissions). All payments to the State under this Section shall be by certified or cashier's check or checks made payable to the State of New Mexico and shall reference the name and address of the party making the payment and the docket number of this case. A copy of the transmittal letter shall be sent to the undersigned counsel for NMED. Settling Defendant shall send the check(s) to:

New Mexico Environment Department
Ground Water Quality Bureau
P.O. Box 26110
Santa Fe, NM 87502-6110
Attn: James Rogers

78. The payment of penalties shall not alter in any way Settling Defendant's obligation to complete the performance of the Work required under this Consent Decree.

79. Penalties shall continue to accrue as provided in Paragraph 75 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA and the State within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA and the State within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States or the State into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA and the State or to Settling Defendant to the extent that it prevails.

80. If Settling Defendant fails to pay stipulated penalties when due, the United States or the State may institute proceedings to collect the penalties, as well as Interest. Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 77.

81. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

82. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XXI. COVENANTS BY PLAINTIFFS

83. United States' Covenant Not to Sue. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 84, 85, and 87 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106, 107(a), and 113(f) of CERCLA relating to the Site. Except with respect to future liability, this covenant not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 54.a of Section XVI (Payments for Response Costs). With respect to future liability, this covenant not to sue shall take effect upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 50.b of Section XIV (Certification of Completion). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. This covenant not to sue extends only to the Settling Defendant and does not extend to any other person.

83.1 In consideration of the payment that will be made by the Settling Federal Agency under the terms of this Consent Decree, and except as specifically provided in Paragraphs 84, 85 and 87 of this Section, EPA covenants not to take administrative action against the Settling Federal Agency pursuant to Sections 106 and 107(a) of CERCLA relating to the Site. Except with respect to future liability, EPA's covenant shall take effect upon the receipt by Settling Defendant of payments required by Paragraph 57.1 of Section XVI (Payments for Response Costs). With respect to future liability, EPA's covenant shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 50.b of Section XIV

(Certification of Completion). EPA's covenant is conditioned upon the satisfactory performance by Settling Federal Agency of its obligations under this Consent Decree. EPA's covenant extends only to Settling Federal Agency and does not extend to any other person.

84. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agency:

- a. to perform further response actions relating to the Site, or
- b. to reimburse the United States for additional costs of response if, prior to

Certification of Completion of the Remedial Action:

- (1) conditions at the Site, previously unknown to EPA, are discovered,

or

- (2) information, previously unknown to EPA, is received, in whole or

in part,

and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

85. United States' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agency:

- a. to perform further response actions relating to the Site, or

b. to reimburse the United States for additional costs of response if, subsequent to Certification of Completion of the Remedial Action:

- (1) conditions at the Site, previously unknown to EPA, are discovered,
- or
- (2) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

86. For purposes of Paragraph 84, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 85, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

87. United States' General reservations of rights. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant, and EPA and the federal natural resources trustees reserve, and this Consent Decree is without prejudice to, all rights against the Settling Federal Agency, with respect to all matters not expressly included within Paragraphs 83 and 83.1. Notwithstanding any other provision of this Consent Decree, the

United States and EPA reserve all rights against Settling Defendant and Settling Federal Agency with respect to:

- a. claims based on a failure by Settling Defendant or Settling Federal Agency to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based upon the Settling Defendant's ownership or operation of the Site, or upon the Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendant;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. criminal liability;
- f. liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and
- g. liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Work Plans).

88. Work Takeover. In the event EPA determines that Settling Defendant has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or

any portions of the Work as EPA determines necessary. Settling Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution), to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. EPA's determination that takeover of the Work is warranted under this Paragraph shall be subject to dispute resolution under Paragraph 68 of this Consent Decree, if informal resolution fails. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendant shall pay pursuant to Section XVI (Payment for Response Costs), notwithstanding any stipulated or other penalties that may also be applicable.

89. The State's Covenant Not to Sue. In consideration of the actions that will be performed by the Settling Defendant and the payments that will be made by the Settling Federal Agency under the terms of the Consent Decree, and except as specifically provided in Paragraphs 90, 91, and 93 of this Section, the State of New Mexico covenants not to sue or to take administrative action against Settling Defendant or Settling Federal Agency pursuant to Section 107(a) of CERCLA, Section 74-4-13 of the HWA, or Sections 74-6-10(A) or 74-6-11(A) of the WQA relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect on the Effective Date of this Consent Decree. With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 50.b of Section XIV (Certification of Completion). Each covenant not to sue is conditioned upon the satisfactory performance by the party to whom it runs (Settling Defendant or Settling Federal Agency) of its obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant and Settling Federal Agency and do not extend to any other person.

90. The State's Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State of New Mexico reserves, and this Consent Decree is without

prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant or Settling Federal Agency:

- a. to perform further response actions relating to the Site, or
- b. to reimburse the State for additional costs of response if, prior to

Certification of Completion of the Remedial Action:

- (1) conditions at the Site, previously unknown to NMED, are discovered, or
- (2) information, previously unknown to NMED, is received, in whole or in part,

and NMED determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

91. The State's Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State of New Mexico reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant or Settling Federal Agency:

- a. to perform further response actions relating to the Site, or
- b. to reimburse the State for additional costs of response if, subsequent to

Certification of Completion of the Remedial Action:

- (1) conditions at the Site, previously unknown to NMED, are discovered, or
- (2) information, previously unknown to NMED, is received, in whole or in part,

and NMED determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

92. For purposes of Paragraph 90, the information and the conditions known to NMED, shall include only that information and those conditions known to NMED as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 91, the information and the conditions known to NMED shall include only that information and those conditions known to NMED as of the date of Certification of Completion of the Remedial Action and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by NMED pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

93. The State's General reservations of rights. The State of New Mexico reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant and Settling Federal Agency with respect to all matters not expressly included within the State's covenant not to sue. Notwithstanding any other provision of this Consent Decree, the State reserves all rights against Settling Defendant and Settling Federal Agency with respect to:

- a. claims based on a failure by Settling Defendant or Settling Federal Agency to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based upon the Settling Defendant's ownership or operation of the Site, or upon the Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in

connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendant;

- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. criminal liability;
- f. liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and
- g. liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Work Plans).

94. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

XXII. COVENANTS BY SETTLING DEFENDANT AND SETTLING FEDERAL AGENCY

95. Covenants Not to Sue by Settling Defendant. Subject to the reservations in Paragraph 97, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Site or this Consent Decree. This covenant not to sue shall take effect upon receipt by Settling Defendant of the payments required by Paragraph 57.1. Subject to the reservations in Paragraph 97, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the State with respect to the Site or this Consent Decree. These covenants not to sue include but are not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
- b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or
- c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the New Mexico Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

95.1 Covenant by Settling Federal Agency. Settling Federal Agency hereby agrees not to assert any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to the Site or this Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as lead or support agency under the National Contingency Plan.

96. Except as provided in Paragraph 99 (waiver of claims against de micromis parties) and Paragraph 104 (waiver of claim-splitting defenses), the covenants of Settling Defendant set forth in Paragraph 95 shall not apply in the event that the United States or the State brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 84, 85, 87 (b) - (d), 87 (g), 90, 91, 93 (b) - (d), or 93 (g), but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

97. The Settling Defendant reserves, and this Consent Decree is without prejudice to:

(a) claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendant's plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA; and (b) contribution claims against the Settling Federal Agency in the event that any claim is asserted by the United States or the State against the Settling Defendant under the authority of or under Paragraphs 84, 85, 87.b - 87.d, 87.g., 90, 91, 93.b - 93.d, or 93.g. of Section XXI (Covenants by Plaintiff), but only to the same extent and for the same matters, transactions, or occurrences as are raised in the claim of the United States or the State against Settling Defendant.

98. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

99. Settling Defendant agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Defendant with respect to the Site is

based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if:

a. the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that the Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against the Settling Defendant.

XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

100. Except as provided in Paragraph 99 (waiver of claims against de micromis parties), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Except as provided in Paragraph 99 (waiver of claims against de micromis parties), each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

101. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendant and the Settling Federal Agency are entitled, as of the Effective Date, to

protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree. The phrase “matters addressed” as used in this paragraph shall mean the financing and satisfactory performance of those matters required by this Consent Decree within the “scope of the remedy selected in the ROD,” as defined in Paragraph 14.b herein, as well as all costs of response for the Site reimbursed to the United States and the State under this Consent Decree, including all satisfactory Work, research, planning, document preparation, investigation, analysis, construction, monitoring, and the like. The “matters addressed” in this settlement do not include those response costs or response actions as to which the United States or the State has reserved its rights under this Consent Decree, in the event that the United States or the State asserts rights against Settling Defendant coming within the scope of such reservations.

102. The Settling Defendant agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim.

103. The Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify in writing the United States and the State within 10 days of service of the complaint on them. In addition, Settling Defendant shall notify the United States and the State within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

104. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion,

claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants set forth in Section XXI (Covenants by Plaintiffs).

XXIV. ACCESS TO INFORMATION

105. Except for information that is protected pursuant to Subparagraph 106.b, Settling Defendant shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendant shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

106. Business Confidential and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B,

the public may be given access to such documents or information without further notice to Settling Defendant.

b. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information that the Consent Decree or SOW requires BNSF to prepare or generate, including but not limited to documents and reports BNSF is required to submit to EPA and data generated during performance of the Work, shall be withheld on the grounds that they are privileged.

107. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXV. RETENTION OF RECORDS

108. Until 10 years after the Settling Defendant's receipt of EPA's notification pursuant to Paragraph 51.b of Section XIV (Certification of Completion of the Work), Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site. This includes all documents and records that relate to the liability of any other person under CERCLA

with respect to the Site. The Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work. Additionally, the Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

109. At the conclusion of this document retention period, Settling Defendant shall notify the United States and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States or the State, Settling Defendant shall deliver any such records or documents to EPA or the State. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, it shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

110. Settling Defendant hereby certifies that to the best of its knowledge and belief, after thorough inquiry:

a. Except as provided in Subparagraphs (1) and (2) below, it has not since notification by the United States on May 3, 1993, of potential liability under CERCLA relating to the Site, altered, mutilated, discarded, destroyed or disposed of any records, documents or other information (other than identical copies) relating to the release or threat of release of Waste Material at or from the Site, the generation, transportation, treatment, storage or disposal of Waste Material generated at the Site, the removal or remediation of environmental contamination resulting from the release of Waste Material at or from the Site, the fate and transport of Waste Material or constituents or breakdown products of Waste Material released at or from the Site, or the effects on human health and the environment of the release of Waste Material at or from the Site. This certification does not apply to the alteration, mutilation, discarding, disposal or destruction prior to January 1, 2004, of:

(1) The following documents, records, or other information generated in connection with the Schwartzman litigation: (i) duplicate copies of original documents, (ii) inconsequential letters and notes, (iii) administrative reports, (iv) drafts, (v) working files, (vi) voice mails, and (vii) e-mails of Settling Defendant, its attorneys or consultants, and,

(2) The following documents, records or other information generated in connection with insurance coverage litigation from 1995 to 2001: (i) duplicate copies of original documents, (ii) inconsequential letters and notes, (iii) administrative reports, (iv) drafts, (v) working files, (vi) voice mails, and (vii) e-mails of Settling Defendant, its attorneys, or consultants.

and,

b. It has complied with any and all EPA requests for information with respect to the Site pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e) and Section 3007 of RCRA, 42 U.S.C. 6927.

110.1 The United States acknowledges that the Settling Federal Agency (1) is subject to all applicable Federal retention laws, regulations, and policies; and (2) hereby certifies that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

XXVI. NOTICES AND SUBMISSIONS

111. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the Settling Federal Agency, the State, and the Settling Defendant, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Chief, Environmental Defense Section
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986

and

Director, Superfund Division
United States Environmental Protection Agency
Region 6
1445 Ross Ave., Ste. 1200
Dallas, Texas 75202-2733

As to EPA:

Terry Roundtree, Remedial Project Manager
EPA Project Coordinator
United States Environmental Protection Agency
Region 6
1445 Ross Ave., Ste. 1200
Dallas, Texas 75202-2733

As to the EPA Regional Financial Management Officer:

Regina Milbeck
Financial Management Officer
United States Environmental Protection Agency
Region 6
1445 Ross Ave., Ste. 1200
Dallas, Texas 75202-2733

As to the State

Susan Morris
State Project Coordinator
New Mexico Environment Department
Ground Water Quality Bureau
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, New Mexico 87501

P.O. Box 26110
Santa Fe, New Mexico 87502-6110

As to the Settling Defendant:

David C. Clark
Settling Defendant's Project Coordinator
Director, Environmental Remediation
The Burlington Northern and Santa Fe
Railway Company

920 SE Quincy
P.O. Box 1738
Topeka, Kansas 66601-1738

and

Vice President and General Counsel, Law
The Burlington Northern and Santa Fe
Railway Company
2500 Lou Menk Dr., AOB 3rd Floor
Ft. Worth, Texas 76131

and

Riaz Ahmed
Settling Defendant's Supervising Contractor
TRC Environmental Consultants
2313 W. Sam Houston Parkway N, Suite 107
Houston, Texas 77043

XXVII. EFFECTIVE DATE

112. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXVIII. RETENTION OF JURISDICTION

113. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

XXIX. APPENDICES

114. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the ROD.

“Appendix B” is the SOW.

“Appendix C” is the Site Location Map.

“Appendix D” is the Draft Environmental Protection Easement and Declaration of Restrictive Covenants.

XXX. COMMUNITY RELATIONS

115. Settling Defendant shall propose to EPA and the State its participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendant under the Plan. Settling Defendant shall also cooperate with EPA and the State in providing information regarding the Work to the public. As requested by EPA or the State, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA or the State to explain activities at or relating to the Site.

XXXI. MODIFICATION

116. Schedules specified in this Consent Decree and the SOW (Appendix B) for completion of the Work may be modified by agreement of EPA and the Settling Defendant. All such modifications shall be made in writing.

117. Settling Defendant may seek modification of the Work Plans. Such a request by the Settling Defendant shall not be made by the Settling Defendant in order to obstruct, hinder, or delay remediation of the Site, nor shall such a request constitute grounds for delay of any activities required under this Consent Decree. Except as provided in Paragraph 14, Subparagraphs a. thru e. (Modification of the SOW or Related Work Plans), no material

modifications shall be made to the SOW without written notification to and written approval of the United States, the State, the Settling Defendant, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R.300.435(c)(2)(B)(ii), may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendant.

118. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

119. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States and the State each reserve the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

120. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXXIII. SIGNATORIES/SERVICE

121. Each undersigned representative of the Settling Defendant to this Consent Decree, and the Assistant Attorney General for the Environment and Natural Resources Division of the U.S. Department of Justice, the EPA, and the State of New Mexico, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

122. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States or the State has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

123. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. The Parties agree that Settling Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXXIV. FINAL JUDGMENT

124. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

125. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State, and the Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Rules 54 and 58 of the Federal Rules of Civil Procedure.

SO ORDERED THIS _____ DAY OF _____, 20____.

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America and State of New Mexico v. The Burlington Northern and Santa Fe Railway Company, relating to the AT&SF Albuquerque Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

July 21, 2004
Date

NICHOLAS F. PERSAMPIERI /
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

DAVID C. IGLESIAS
United States Attorney
District of New Mexico
P.O. Box 607
Albuquerque, New Mexico 87103

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America and State of New Mexico v. The Burlington Northern and Santa Fe Railway Company, relating to the AT&SF Albuquerque Superfund Site.

7/15/04

Date

SAMUEL COLEMAN, P.E.

Director, Superfund Division, Region 6
U.S. Environmental Protection Agency
1445 Ross Ave., Ste. 1200
Dallas, Texas 75202-2733

July 15, 2004

Date

JAMES L. TURNER

Senior Attorney, Office of Regional Counsel
U.S. Environmental Protection Agency
1445 Ross Ave., Ste. 1200
Dallas, Texas 75202-2733

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America and State of New Mexico v. The Burlington Northern and Santa Fe Railway Company, relating to the AT&SF Albuquerque Superfund Site.

FOR THE STATE OF NEW MEXICO

July 13, 2004
Date

RON CURRY
Cabinet Secretary
New Mexico Environment Department
P.O. Box 26110
Santa Fe, New Mexico 87502

July 6, 2004
Date

CHARLES DE SAILLAN
Assistant General Counsel
New Mexico Environment Department
Harold Runnels Building
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, New Mexico 87502

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America and State of New Mexico v. The Burlington Northern and Santa Fe Railway Company, relating to the AT&SF Albuquerque Superfund Site.

**FOR THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY**

7/21/04
Date

GREGORY W. STENGEM
Vice President, Safety, Training
and Operations Support
2600 Lou Menk Drive
Fort Worth, Texas 76131

7/8/04
Date

LARRY P. AUSERMAN
Attorney at Law
Modrall Sperling Roehl Harris & Sisk, P.A.
P.O. Box 2168
Albuquerque, NM 87103-2168

Agent Authorized to Accept Service on Behalf of Above-signed Party:

CT CORPORATION SYSTEM
123 E. Marcy, Ste. 201
Santa Fe, NM 87501

APPROVED AS TO FORM

SENIOR GENERAL ATTORNEY

